BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRANDIE SHARP	)	
Claimant	)	
	)	
VS.	)	
	)	
DEFFENBAUGH INDUSTRIES	)	
Respondent	)	Docket No. 1,001,663
	)	
AND	)	
	)	
ZURICH US INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the October 14, 2004 Preliminary Decision entered by Administrative Law Judge (ALJ) Robert H. Foerschler.

ISSUES

The ALJ denied claimant's request for additional medical treatment for her ongoing knee complaints as he concluded claimant had failed to satisfy her burden of showing her present need for treatment was causally related to her work-related injury, which occurred on September 18, 2001.

The claimant requests review of the ALJ's decision and argues it should be reversed. Claimant maintains the greater weight of the medical evidence supports her claim that her ongoing right knee complaints are causally related to her September 18, 2001 accident. She further contends that the subsequent "giving way" of her knee she experienced beginning in 2002 is indicative of her ongoing complaints which remain unresolved and does not constitute a new, distinct, intervening and/or unrelated accident.

Claimant also objects to the ALJ's reliance upon and consideration of a deposition and affidavit of a former co-worker, Patrick Henry. Distilled to its essence, Mr. Henry

testified that claimant disclosed she had suffered a re-injury while at home in some sort of scuffle with her boyfriend in January 2002, and after being released from treatment by Dr. Roger Hood, the treating physician. Claimant denies this fact or that she ever had such a conversation with Mr. Henry. Moreover, claimant contends this evidence came to the ALJ's attention after the close of evidence. Accordingly, claimant believes the ALJ exceeded his jurisdiction in considering this evidence. Claimant contends the ALJ should have issued his decision without regard to the content of Mr. Henry's deposition as K.S.A.44-534a(a)(2) requires him to make a decision within five days of the conclusion of the hearing.

Respondent argues that claimant has provided the physicians with an inconsistent history with respect to the onset of her present right knee complaints and that, coupled with the testimony of Mr. Henry, persuaded the ALJ that claimant had failed to meet her evidentiary burden. Respondent urges the Board to affirm the ALJ's Preliminary Decision in all respects.

The issues to resolve are as follows:

1. Whether claimant's present right knee complaints are causally related to her work-related injury of September 18, 2001, or the result of a new and distinct injury that occurred in January 2002.

2. Whether the ALJ exceeded his jurisdiction by considering the deposition testimony of Mr. Patrick Henry, testimony that was arguably taken outside the time allotted by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a bucket-handle tear of her right medial meniscus on September 18, 2001 while she was walking across a parking area on respondent's premises. There is apparently no dispute that this was a compensable injury. Respondent provided treatment with Dr. Roger Hood, which included surgery on October 10, 2001 to repair the tear. On November 9, 2001, claimant was released to return to full duty and on December 27, 2001, Dr. Hood found her to be at maximum medical improvement.

Dr. Hood's notes indicate claimant was doing well with her recovery and tolerating work "quite well."[1] He went on to say "[s]he seems to be coming along just fine from my

[1] P.H. Trans., Resp. Ex. A.

perspective."[2] According to claimant she was able to work, but she went on to explain that things "weren't right with it [her knee]."[3] She testified that the knee would pop out of place and that it wasn't okay. Claimant indicated that when she disclosed this to Dr. Hood, he went ahead and signed her off, but told her if anything happens within the next 60 days that she could return.

Shortly thereafter (claimant says it was the next day), claimant returned home from work one day on a Friday in early January 2002. She got out of her car and walked a few steps. As she went to step over a railroad tie, her right leg gave out and she fell.[4] Claimant tried to call Mr. Tom Steck, the workers compensation administrator, on the following Monday and Tuesday. When she got no response she drove to the workplace and requested treatment. Mr. Steck refused. Claimant continued to work for respondent for a period of time, but was ultimately terminated for excessive absences or tardiness.

In 2003, after retaining an attorney, respondent referred claimant back to Dr. Hood for further evaluation. Dr. Hood recommended she have an MRI, but because claimant was pregnant, the test was delayed. The MRI was done in December 2003. According to Dr. Hood, this revealed "nothing new on this".[5]

On her own, in February 2004, claimant sought an evaluation from Dr. Keith Sheffer. Dr. Sheffer not only examined claimant, he reviewed the December 2003 MRI results. He opined that "she has still some problems internally either chrondromalacia with medial femoral condyle or a contour of the medial meniscus that is not working well for her. As a result of that I am recommending that she have repeat right knee arthroscopy for evaluation of the medial side of her knee."[6]

A preliminary hearing was scheduled, but deferred as the parties agreed that she should be sent to Dr. Lowry Jones for purposes of a third opinion. Dr. Jones evaluated claimant on June 8, 2004. According to Dr. Jones' report, he reviewed the pictures taken during her original arthroscopic procedure. He concluded that "it appeared that she had a meniscal tear and also questionably a chrondral injury of the medial femoral condyle, which was not really reported, but did appear to be present by the pictures."[7] He

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[2] *Id.*

[3] *Id.* at 10.

[4] *Id.* at 11.

[5] *Id.*, Resp. Ex. A. at 2 (Dec. 23, 2003 Letter).

[6] *Id.*, Cl. Ex. 1 at 7 (Dr. Sheffer's Feb. 3, 2004 report at 2).

[7] *Id.*, Cl. Ex. 1 at 4 (Dr. Jones' June 8, 2004 report).

recommended a re-arthroscopy. Dr. Jones further indicated that there was no indication that claimant had sustained a new injury "but that her pain is really in the same place that she had her previous arthroscopic treatment."[8]

Respondent's counsel then wrote to Dr. Jones and provided him with what he believed was "additional information concerning 'causation' of her [claimant's] 'secondary' knee injury."[9] Respondent maintains claimant gave Dr. Jones erroneous information about when her knee buckled and that his client "heard she [claimant] had some type of altercation with her boyfriend" while at home after work on January 5, 2002.[10] This letter also indicates claimant had worked full duty for a matter of months after being released before she then reported her knee giving way. It does not appear that claimant's lawyer was provided with a copy of this letter.

Dr. Jones responded to the letter on July 19, 2004. In his letter, he reflected upon his office notes and compared them to counsel's recitation of the events. He indicated that given some of the inconsistencies, "it is not possible to say whether this is due to ongoing problems or an acute injury, but if the history in which you have given is consistent, and she had been back doing full duty, *and months later presented with knee pain*, I would certainly consider this an acute new injury rather than persistent old problems."[11]

Respondent refused to provide the recommended treatment, and on September 2, 2004 a preliminary hearing was held. Claimant testified to the circumstances surrounding her accident and her ongoing right knee complaints. Tom Steck testified as well. According to him, he spoke to claimant on Monday, January 7, 2002. On that date she informed him that she did something to her knee on Friday night while at home and needed to return to the doctor. He told her to come in and see him. In the meantime, he was going to check with her supervisor to see what happened and if her injury had anything to do with work.[12]

Mr. Steck then attempted to testify as to his efforts at investigating this new development. This testimony met with an objection by claimant's counsel. The following exchange occurred:

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[8] *Id.*, Cl. Ex. 1 at 5 (Dr. Jones' June 8, 2004 report).

[9] *Id.*, Cl. Ex. 1 at 2 (Letter from Steve Albert, counsel for respondent to Dr. Jones dated July 7, 2004).

[10] *Id.*

[11] *Id.*, Cl. Ex. 1 at 1 (Dr. Jones' Letter dated July 19, 2004).

[12] *Id.* at 49.

MR. KOLICH: Judge, I'm going to object to this. He's going to talk about a bunch of hearsay and what a bunch of people told him that aren't here to testify. I object to it.

THE COURT: Well, theoretically two of them are going to be here.

MR. KOLICH: We don't know that. They don't work for Deffenbaugh anymore and my guess is they aren't going to find them or the people probably won't be willing to testify. There's no reason to have him testify about it.

THE COURT: Well, this is going to be the best evidence of what they said.

MR. ALBERG: Well, not only that, your Honor, he has a right to testify as to what his investigation revealed.

MR. KOLICH: He does not. Just because he investigated doesn't mean you get hearsay evidence in and hearsay is never the best evidence anyway. Either they get the witnesses here or you can't have it.

MR. ALBERG: I'm asking him what he learned. I'm not asking –

MR. KOLICH: He learned it because someone else told it to him for God's sake. It's hearsay.

THE COURT: Take it easy, Mark.

MR. KOLICH: Well, we've been going through a bunch of crap here that has nothing to with anything, Judge, and it's just aggravating as hell to me.

THE COURT: Let's just say that Tom can tell us that he got some different information from these people. Evidently you learned that they didn't report to you that she had hurt herself on the job.

THE WITNESS: What was reported to me, Judge, is that she came in on Saturday morning limping and said she did something at work the night before and I checked that out and then--

Q: (Mr. Alberg): At work?

A: Yes. [13]

The investigation Mr. Steck refers to involved two employees, neither of which is presently in its employ. Respondent attempted to offer the affidavits of each of these individuals at the preliminary hearing, but the ALJ refused to admit them until their

[13] *Id.* at 50-51.

depositions could be taken. At the conclusion of Mr. Steck's testimony, the ALJ said "I don't know if you guys are going to want to talk to those two co-employees. I'll give you a week or so and see if you want to run them down."[14]

Nothing more happened on this case until September 15, 2004. On that date, claimant's counsel wrote to the ALJ. Mr. Kolich indicated that at least a week had passed since the preliminary hearing had been adjourned and that respondent's counsel had yet to take any depositions. He did, however, acknowledge that one deposition had been scheduled for October 1, 2004 and in fact, a notice for that deposition was sent out on September 15, 2004.

The deposition of Patrick Henry was taken on October 1, 2004. During this deposition Mr. Henry's affidavit was offered as an exhibit and no objection was noted. Respondent also offered the affidavit of the other co-employee who apparently could not be found. Claimant's counsel objected to this exhibit.

Mr. Henry testified that he worked with claimant on the Friday after New Years Day. According to him, they worked from 7:30 in the morning until about 3:30 that afternoon. He did not observe her having any difficulties performing the job as trash truck helper, picking up trash barrels and running back and forth to put the trash in the truck.[15]

The next day, claimant came to work at about 7:00 in the morning. When he first saw her, he saw she was limping up to the truck.[16] He asked what had happened and Mr. Henry says claimant told him "no", that it was from horseplay on the steps with her boyfriend on the Friday night before.[17] Mr. Henry relayed this to Mr. Steck sometime after the conversation and over a year later, he was asked to memorialize this event in an affidavit.

Thereafter, the ALJ issued his Preliminary Decision. In his Order, he noted that Dr. Jones has recommended further treatment, but that he expressed "some reservation that it might be from an intervening later accident at home".[18] He went on to acknowledge that claimant denies the existence of an intervening accident "but some evidence has been disclosed that she told co-employees of that new accident later during her work, and in

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[14] *Id.* at 61.

[15] Henry Depo. at 7-8.

[16] *Id.* at 8.

[17] *Id.* at 9.

[18] ALJ Order (Oct. 14, 2004).

fact, seemed to exhibit leg symptoms not noticeable before that report, although she was described as a good worker".[19]

Clearly, from the content of the Preliminary Decision, the ALJ read Mr. Henry's deposition, a transcript that was taken and submitted sometime after October 1, 2004. And it appears that the ALJ remained unpersuaded that claimant's ongoing right knee complaints were related to her initial injury. Had the ALJ not reviewed and considered Mr. Henry's deposition, his decision might well have been different. Indeed, claimant alleges that the ALJ's decision to consider this deposition evidence exceeded his jurisdiction as respondent failed to come forward with this evidence within the period set forth by statute, K.S.A. 44-534a(a)(2), and beyond the time period allotted by the ALJ.

Although the Board does not normally have jurisdiction over this evidentiary issue following a preliminary hearing, claimant's allegation that the ALJ exceeded his authority bestows jurisdiction under K.S.A. 44-551(b)(2)(A). Having determined that jurisdiction is present, the Board now turns to the propriety of the ALJ's decision to consider Mr. Henry's deposition testimony.

The ALJ refused to admit the affidavits at the preliminary hearing until such time as respondent had a chance to make the affiants available for a deposition.[20] He advised the parties that he would allow them a "week or so" to get the depositions taken. By holding the record open, the ALJ was essentially continuing the matter until such time as the evidence could be obtained. The Board has recognized and approved this practice in the past.[21] In such instances, the Board has also held that the five day period set forth in K.S.A. 44-534a(a)(2) begins to run at the close of evidence. The difficulty here is that it is impossible to determine when the 5 day period was to have begun because of the vague nature of the ALJ's directive. As such, the Board finds the matter was continued and the record was held open until the evidence was obtained.

Under these facts, the Board finds the ALJ did not exceed his jurisdiction in considering Mr. Henry's deposition. Here, there was a delay in scheduling the deposition, apparently due to inaction by respondent's counsel. Nonetheless, the deposition was taken within a reasonable time given the ALJ's directive of completing the evidence within a "week or so". Accordingly, the Board will go ahead and consider the testimony in reviewing the ALJ's Preliminary Decision.

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[19] *Id.*

[20] P.H. Trans. at 34.

[21] *Hawk v. Rubbermaid-Winfield, Inc.*, No. 180,303, 1994 WL 749408 (Kan. WCAB Mar. 24, 1994).

Turning now to the compensability aspect of this appeal, the Board finds that the ALJ's decision should be reversed. The Board has reviewed the reports authored by each of the physicians who have either treated or examined the claimant. Both Drs. Jones and Sheffler have indicated that claimant requires additional surgical treatment to her right knee. And they have opined that her present condition is related to her original injury. Dr. Jones even viewed pictures of the arthroscopic procedure and noted an injury to the medial femoral condyle, which coincides with the location of claimant's present knee complaints. He specifically stated that "at this point, [I] feel she would improve with re-arthroscopy, and I do not believe by examination that there is any indication that she has had a new injury, but that her pain is really in the same place that she had previous arthroscopic treatment."[22] It is important to note that the photographs which Dr. Jones reviewed were taken well before the events of January 2002.

While Dr. Jones later equivocated about the causation aspect of claimant's complaint and its relationship to her original accident, that doubt was created by respondent's counsel and based upon the Board's review of that letter, finds that he was given information that is inaccurate. Claimant had not returned to work at full duty for a matter of months. To the contrary, the records show that claimant was back working for respondent as of November 29, 2001 and was later released at maximum medical improvement on December 27, 2001. She was then apparently back working on the back of a trash truck, at most, for 2 weeks before January 7, 2002, when she experienced her knee giving way. For that reason, coupled with the fact that the problem she presently has was documented by photographs during her initial surgical procedure, the Board is not persuaded by Dr. Jones' revised opinion.

Only Dr. Hood, the treating physician who performed the surgery, has continued to maintain that claimant is at maximum medical improvement and requires no further medical treatment. His opinion is likewise called into question as the original pictures from the arthroscopic procedure reveal an injury to the medial femoral condyle that was not addressed during surgery. Claimant testified that she continued to complain about pain in her knee, in the medial joint, even during her last visit with Dr. Hood. Then she testified that her knee gave way while stepping over a railroad tie at her home shortly after her release from treatment.

Based upon the facts contained within the record, the Board finds that claimant is entitled to the additional medical treatment outlined by both Drs. Jones and Sheffer. Accordingly, the ALJ's decision denying claimant additional medical benefits is reversed and respondent is directed to provide claimant with additional medical treatment through either Dr. Jones or Dr. Sheffer.

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[22] P.H. Trans., Cl. Ex. 1 at 5 (Dr. Jones' June 8, 2004 report).

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.[23]

WHEREFORE, it is the finding, decision and order of the Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated October 14, 2004, is reversed and remanded for proceedings not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of March, 2005.

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Steven C. Alberg, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[23]K.S.A. 44-534a(a)(2).